

Rule 6, Ariz. R. Crim. Proc.

RIGHT TO COUNSEL — Sixth Amendment right to counsel for “the accused” in a “criminal prosecution” attaches once an adversary criminal prosecution has begun.....Revised 1/2010

The overarching purpose of the right to counsel in criminal cases is to safeguard those “rights deemed essential for the fair prosecution of a criminal proceeding.” *Maine v. Moulton*, 474 U.S. 159, 169 (1985). The Sixth Amendment to the United States Constitution explicitly provides criminal defendants the right to the assistance of counsel:

In all criminal prosecutions, the accused shall enjoy the right to ...
have the Assistance of Counsel for his defence.

The United States Supreme Court has explained that the right to counsel under the Sixth Amendment is intended to protect the layman from confrontations with the government “at the initiation of the adversary judicial criminal proceedings” with respect to a particular crime. *U.S. v. Gouveia*, 467 U.S. 180, 189 (1984). Therefore, the Sixth Amendment right to counsel applies only to “the accused” in a “criminal prosecution” – that is, a defendant’s Sixth Amendment right attaches only when a government agency has formally begun criminal proceedings against a defendant on a specific case.

As the Arizona Supreme Court explained in *State v. Atwood*, 171 Ariz. 576, 666-67, 832 P.2d 593, 683-84 (1992), *disapproved on other grounds*, *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001), the Sixth Amendment right to counsel does not attach until adversary judicial criminal proceedings are initiated.

Until adversary criminal proceedings begin, there is no “criminal prosecution,” no “accused,” and no need for a defense. Accordingly, “the purpose of the right to counsel is served, and the right to counsel attaches, only after adversary criminal proceedings have been initiated.” *Atwood, id.*

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that the Fourteenth Amendment makes the Sixth Amendment’s mandate of the assistance of counsel for criminal defendants obligatory on the States. Therefore, an indigent defendant in a criminal prosecution in a State court has a right to have counsel appointed for him. The Arizona Supreme Court has held that denial of a defendant’s Sixth Amendment right to counsel requires automatic reversal:

Because the deprivation of a defendant’s Sixth Amendment right to counsel “infect[s] the entire trial process,” it requires automatic reversal. *Bland v. California Dep’t of Corrections*, 20 F.3d 1469, 1478 (9th Cir. 1994); see *United States v. Taylor*, 113 F.3d 1136, 1144 (10th Cir. 1997).

State v. Moody, 192 Ariz. 505, 509, 968 P.2d 578, 582 (1998).

Invoking one’s right to counsel under the Sixth Amendment does not automatically imply asserting one’s right to counsel under the Fifth Amendment, and vice versa. An accused’s invocation of his Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the right to counsel derived by *Miranda v. Arizona*, 384 U.S. 436 (1966), from the Fifth Amendment’s guarantee against compelled self-incrimination. In *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the defendant was charged with an armed

robbery and jailed for that charge. He invoked his right to counsel in the judicial proceedings on the robbery. While he was in jail on the robbery charge, police suspected that he was involved in a murder and related crimes. The police came to the jail and read him his *Miranda* rights and, after he waived them, they questioned him about the murder offenses. The defendant admitted those offenses, and, based on those admissions, the defendant was charged with the murder and related crimes. He moved to suppress the statements, arguing that his invocation of the right to counsel in the robbery case “constituted an invocation of the *Miranda* right to counsel, and that any subsequent waiver of that right during police-initiated questioning regarding *any* offense was invalid.” *Id.* at 174 [emphasis in original]. The United States Supreme Court disagreed, stating that the Sixth Amendment right to counsel is “offense specific” and “cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced.” *Id.* at 175. The Court concluded that because the defendant had given the police the statements about the murder offenses before his Sixth Amendment right to counsel on those offenses had even attached, the statements were admissible on those offenses. *Id.* at 176.

In *Massiah v. U.S.*, 377 U.S. 201 (1964), a codefendant decided to cooperate with the State after Massiah was indicted on federal narcotics conspiracy charges and released on bail. The codefendant allowed government agents to install a hidden listening device in the codefendant’s car. The codefendant then met with Massiah in the codefendant’s parked car while an

agent some distance away listened to and recorded the conversation. During the meeting, the codefendant, secretly acting as an agent of the government, asked Massiah questions about the narcotics conspiracy offenses, and Massiah made damaging admissions. The Court found that Massiah's recorded statements were inadmissible because his Sixth Amendment right to counsel was violated. The Court reasoned that the defendant was, unknowingly, under interrogation and was without the assistance of counsel after criminal proceedings had begun. The Court stated:

We hold that the petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.

Id. at 206.

Fellers v. U.S., 540 U.S. 519 (2004), is another case involving the Sixth Amendment right to counsel. A grand jury indicted Fellers on drug charges and issued an arrest warrant. Officers went to his home to arrest him and he invited them in. The officers told him about the indictment and warrant and told him they had come to discuss his involvement in drug offenses. They asked him questions and he made damaging admissions. Fellers moved to suppress those statements, arguing that the police deliberately elicited those statements from him in his counsel's absence, thus violating his Sixth Amendment right to counsel under *Massiah*, *supra*. The United States Supreme Court agreed that because Fellers had been indicted on the drug charges, the police should have informed

Fellers of his right to counsel before they deliberately elicited information from him about those offenses. Thus, the statements were obtained in violation of Fellers's Sixth Amendment rights and should have been suppressed.

Note also that *Miranda* warnings are sufficient to make a defendant aware of the consequences of a decision to waive his Sixth Amendment rights during postindictment questioning. "By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, petitioner was essentially informed of the possible consequences of going without counsel during questioning." *Patterson v. Illinois*, 487 U.S. 285, 294 (1988).